IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-933

ROBERT A. McAULIFFE,

Petitioner,

v.

ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Robert A. McAuliffe, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on August 1, 1975.

Opinions Below

The opinion of the court of appeals, which is reported at 520 F.2d 1305, is set out in the Appendix, pp. 30a-36a. The order of the court of appeals denying rehearing, which is not reported, is set out in the Appendix, p. 37a. The district court opinion of May 20, 1974, which is reported at 377 F.Supp. 896, is set out in the Appendix, pp. 1a-19a. The district court opinion of January 6, 1975, which is reported at 386 F.Supp. 1245 is set out in the Appendix, pp. 20a-29a.

Jurisdiction

The judgment of the court of appeals was entered on August 1, 1975. The petition for rehearing was denied on September 5, 1975. On November 21, 1975, Mr. Justice Marshall signed an order extending the time in which to file a petition for writ of certiorari until January 2, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the Eleventh Amendment preclude an action in federal court against a state official to compel that official to return property seized and held in violation of the Fourteenth Amendment?

2. If the Eleventh Amendment confers immunity from such an action, was that immunity waived in this case?

Constitutional Provision Involved

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statement of the Case

In 1971-72 plaintiff was confined in mental health facilities operated by the State of Connecticut. The defendant

is the State Commissioner of Finance and Control. In 1971 the defendant, acting pursuant to state law,[1] persuaded the Social Security Administration to pay to him, as a "representative payee," certain disability benefits owed to plaintiff. Under the applicable federal regulations defendant was required to use these funds "only for the use and benefit" of the beneficiary and "in the beneficiary's best interest." 20 C.F.R. §404.1603. Instead the defendant, in his capacity as plaintiff's guardian, paid over to himself, in his capacity as Commissioner of Finance and Control, $1,098.07 for the cost of plaintiff's treatment.

In 1972 plaintiff deposited $150.00 in a savings account at the institution where he was then confined. State law[2] conclusively presumed that all mental patients with modest assets were incompetent, and designated defendant as their conservator or guardian. Acting in this capacity defendant seized the proceeds of this bank account and then paid them over to himself in his capacity as Commissioner of Finance and Control, again for the cost of plaintiff's treatment. The record does not indicate that the defendant as guardian ever maintained a separate bank account for these funds; apparently the funds were deposited in an account with other monies under defendant's control and the payment effectuated by some form of bookkeeping entry indicating that the $1,248.07 was henceforth held by defendant as Commissioner of Finance and Control rather than as plaintiff's guardian.

Plaintiff brought this action in the United States District Court for the District of Connecticut seeking to compel the defendant to return the $1,248.07. On May 30, 1974,

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[1] Conn. Gen. Stat. §4-68c.

[2] Conn. Gen. Stat. §4-68g.

the district court held that the state statute requiring plaintiff, but not other patients, to pay for treatment,[3] and conclusively presuming plaintiff to be incompetent, were unconstitutional. Pp. 1a-19a. The district court thought it unnecessary to order defendant to return the funds "since it is expected that, in light of this decision declaring the challenged statutes unconstitutional, defendant will agree to return to plaintiff the property taken from him". Pp. 18a-19a, n.13. The defendant, who declined to appeal the decision invalidating the statutes involved, refused to return that property. He offered no defense to the claim that the funds belonged to plaintiff other than to assert that the Eleventh Amendment rendered him immune from any order to return that property. Pp. 22a-29a. On January 16, 1975, the district court ordered defendant to return plaintiff's money. On August 1, 1975, the court of appeals reversed, holding that the Eleventh Amendment precluded the federal courts from affording plaintiff any remedy for the admittedly unconstitutional seizure of his property.

Reasons for Granting the Writ

Although the illegality of the defendant's conduct is undisputed, the nature of the constitutional violation involved is important. The defendant never acted as a "guardian" or "conservator" in the ordinary senses of those terms; he invoked that capacity conferred upon him by state law solely for the purpose of seizing plaintiff's funds and transferring them to himself in his capacity as Commissioner of Finance and Control. There was no finding or allegation that plaintiff was in fact incapable of handling the modest sums of money involved, or that plaintiff in any way

[3] Conn. Gen. Stat. §17-318.

benefited by his "guardian's" action. In sum, the statutes designating defendant as plaintiff's conservator served as an expeditious device by which a state official could expropriate the funds of a mental patient.

Defendant's conduct violated plaintiff's rights in four distinct ways. First, in seizing plaintiff's property without any prior notice, warning, or hearing, defendant violated plaintiff's right to procedural due process. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Second, the Connecticut statute requiring plaintiff, but not other classes of patients, to reimburse the state for treatment denied plaintiff equal protection of the laws. Pp. 5a-14a. Third, the Connecticut statute appointing defendant as plaintiff's conservator, based on a conclusive presumption that any mental patient with less than $5,000 in assets or annual income was incompetent, violated due process of law. Pp. 15a-18a. Fourth, having learned that his seizure of plaintiff's property was unlawful, the defendant refused to either return that property or otherwise reimburse plaintiff, thus violating the Fourteenth Amendment ban on the taking of property without just compensation. *Chicago, etc., R.R. Co.* v. *Chicago*, 166 U.S. 226 (1897).[4]

The defendant in this case has long ago abandoned any contention that he has any legal right, as a state official or otherwise, to possession of plaintiff's money.[5] Nor does the defendant deny that, had plaintiff known in advance of the planned expropriation, he could have obtained an in-

[4] There is also a serious question as to whether the designation of the defendant as plaintiff's conservator violated due process of law inasmuch as defendant faced an obvious conflict of interest with his responsibilities as the Commissioner of Finance and Control. P. 24a.

[5] No appeal was taken from the district court's decision to this effect.

junction against it under *Ex parte Young*, 209 U.S. 123 (1908). But the defendant gave plaintiff no prior notice of the intended seizure, which was accomplished at a time when plaintiff was incarcerated and state officials maintained he was mentally ill and presumably even less able than usual to protect his rights. Defendant maintains that, by proceeding in this *ex parte* manner and by promptly commingling plaintiff's property with state funds, he succeeded in depriving plaintiff of any remedy. The Second Circuit held that, if a state official seizes and continues to hold the private property of a citizen in undisputed violation of the Constitution of the United States, the Eleventh Amendment bars the federal courts from issuing an injunction directing the return of that property.[6] The decision of the court of appeals is squarely in conflict with the decisions of this Court.

This Court has expressly held that the Eleventh Amendment does not bar an action against a state official for the return of unlawfully appropriated property. *Tindal* v. *Wesley*, 167 U.S. 204 (1897), upheld an action against several state officials for the return of real property.[7] *Poindexter* v. *Greenhow*, 114 U.S. 270 (1885), concluded that the Eleventh Amendment did not preclude an action against a state tax collector for the return of a desk seized in violation of the constitution. *Ex Parte Tyler*, 149 U.S. 164 (1893) sustained a suit to recover railroad cars that had been unlawfully appropriated by state officials. See also *United States* v. *Peters*, 5 Cranch. (9 U.S.) 115 (1809) (action for return of loan office certificates). On at least four occasions this Court has stated that the Eleventh Amendment does not bar a suit for the return of a specific sum of money seized or held in violation of the constitution.[8]

[6] The court of appeals' decision was not limited to the facts of this case; it reaffirmed its earlier decision in *Knight* v. *State of New York*, 443 F.2d 415 (1971), that state officials who appropriated real property were protected by the Eleventh Amendment from suits to compel the return of that property. P. 34a.

[7] "The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover the possession of real property is a suit against the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf . . . . [T]he 11th Amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law." 167 U.S. at 221-222.

The principle of *Tindal* v. *Wesley* has been repeatedly reaffirmed by this Court. *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47 (1944) expressly sanctioned, notwithstanding the Eleventh Amendment, actions to recover "possession of specific property likewise wrongfully obtained or held. . . . In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against a wrongdoer personally." 322 U.S. at 50-51. *Larson* v. *Domestic and Foreign*

[8] "[W]here a suit is brought against defendants who claim to act as officers of a state and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, *to recover money* or property in their hands unlawfully taken by them in behalf of the state . . . [it] is not, within the meaning of the amendment, an action against the state." ***Ex Parte Tyler***, 149 U.S. 164, 190 (1893). (Emphasis added)

"[W]here a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, *to recover money* or property in their hands unlawfully taken by them in behalf of the state . . . such a suit is not, within the meaning of the amendment, an action against the state." *Scott* v. *Donald*, 165 U.S. 58, 68-70 (1897). (Emphasis added)

"[A] suit . . . brought against defendants who claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of injury and wrong to the rights and property of the plaintiff . . . *to recover money* or property in the hands of such defendants, unlawfully taken by them in behalf of the State . . . is not within the meaning of the Eleventh Amendment an action against the State." *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 11 (1891). (Emphasis added)

Tindal v. *Wesley*, 167 U.S. 204, 220 (1897).

Commerce Corp., 337 U.S. 682 (1949), confirmed the holding of *Tindal* "that a suit to recover possession of property owned by the plaintiff and withheld by officers of a state was analogous to a suit to enjoin the officers from enforcing an unconstitutional statute." 337 U.S. at 698, n. 20.[9]

The same principle has been consistently applied to suits against federal officials to recover possession of unconstitutionally seized property. In *United States* v. *Lee*, 106 U.S. 196 (1882), federal officials expropriated land of the late Robert E. Lee for use as a national cemetery; this Court held that General Lee's heirs could maintain an action for ejectment against the officials involved. *Land* v. *Dollar*, 330 U.S. 731 (1947), upheld an action to compel the United States Maritime Commission to return certain stock.[10] *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), reaffirmed the decision in *Lee* that sovereign immunity affords no defense to public officials whose "possession of the property was an unconstitutional use of their power." 337 U.S. at 697.

The rule of *Tindal* and *Lee* is clearly correct. When a public official seizes and holds private property in violation of the constitution, he ceases to act as an agent of the state and assumes the role of a mere private wrongdoer. *Ex parte Young*, 209 U.S. 123 (1908). An action for the return of such property in no sense interferes with the property of the state, for the defendant holds the property solely

[9] See also *Georgia R.R., etc. Co.* v. *Redwine*, 342 U.S. 299, 304, n. 14 (1952); *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, 643 (1911); *Ex Parte Young*, 209 U.S. 123, 152 (1908).

[10] The Court reasoned that where public officials "unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment. The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." 330 U.S. at 738.

in his individual capacity and title thereto remains at all time with the private owner.[11] Thus in the instant case there is no need to spend any funds that are now or ever were part of the public fisc, but only to return a specific amount illegally obtained and withheld by a state official. The defendant's continued retention of plaintiff's property constitutes an ongoing violation of plaintiff's rights; injunctive relief to end that violation is essentially prospective in nature.[12] The Eleventh Amendment cannot bar judicial redress for the seizure of plaintiff's property by a state official, for such immunity would nullify the Fourteenth Amendment's ban on the taking of such property without just compensation.[13] When a public official unlawfully appropriates such property and a private citizen sues to enforce the constitution, it is the private citizen not the official who assumes the mantel of the sovereign in imple-

[11] "Since, then, the State of Pennsylvania had neither possession of, nor right to, the property on which pronounced. . . . There remains no pretext for the allegation that the case is within [the Eleventh] Amendment. . . ." *United States* v. *Peters*, 9 U.S. (5 Cranch.) 115, 141 (1809).

[12] "Although the plaintiff below was nominally the actor, the action itself is purely defensive. Its object is merely to resist an attempted wrong and to restore the *status in quo* as it was when the right to be vindicated was invaded. In this respect it is upon the same footing with the preventive remedy of injunction in equity. . . ." *Poindexter* v. *Greenhow*, 114 U.S. 270, 295 (1885).

[13] "Any other view leads to this result: That if a state, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no state shall deprive any person of property without due process of law (*Chicago, B. & O. R. Co.* v. *Chicago*, 166 U.S. 226, 236, 241), the citizen is remediless so long as the state by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated." *Tindal* v. *Wesley*, 167 U.S. 204, 222 (1897).

menting public policies of the highest importance.[14] This Court has expressly distinguished such an action for the return of unlawfully seized and held property from an ordinary suit for a refund of state taxes.[15]

In *United States* v. *Lee,* this Court asked:

> Shall it be said . . . that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without any process of law, and without any compensation, because the President has ordered it and his officers are in possession? If such be the law of this country it sanctions a tyranny which has no existence in the monarchies of Europe nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights. 106 U.S. at 220.

The retention of illegally seized private property, which is forbidden to individuals purporting to have acted by au-

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[14] "The defendant in error is not [Virginia's] officer, her agent, or her representative, in the matter complained of, for he has acted . . . without her authority. . . . The plaintiff in error, in fact and in law, is representing her, as he seeks to establish her law and vindicates her integrity as he maintains his own right." *Poindexter* v. *Greenhow,* 114 U.S. 270, 293 (1885). See *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968).

[15] *Smith* v. *Reeves,* 178 U.S. 436 (1900), held that such an action for a refund was barred by the Eleventh Amendment. It noted that, "this case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. *Tindal* v. *Wesley.*" 178 U.S. at 439. *Ford Motor Co.* v. *Treasury Department,* 323 U.S. 459 (1945), which relied upon and reaffirmed the decision in *Smith* as to tax refunds, in no way questioned the distinction drawn in *Smith* or the vitality of *Tindal.*

thority of the President of the United States, is forbidden as well to individuals claiming to have acted pursuant to a concededly unconstitutional state statute. The Fourteenth Amendment's requirement that private property shall not be taken without just compensation

> is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Chicago etc., R.R. Co.* v. *Chicago,* 166 U.S. 226, 236 (1897).

The Eleventh Amendment was intended only to protect "the general revenues of a State", *Edelman* v. *Jordan,* 415 U.S. 651, 664 (1974); it does not license state officials to supplement those revenues by expropriating the social security disability benefits and meagre savings of the mentally ill.

In concluding that the defendant could retain the property he had unlawfully taken from plaintiff, the court of appeals relied heavily on its recent decision in *Fitzpatrick* v. *Bitzer,* 519 F.2d 559 (2nd Cir. 1975). Certiorari was granted in *Fitzpatrick* on December 15, 1975. 44 U.S. L.W 3354. Under these circumstances it might be appropriate to defer consideration of the instant case until a decision is reached in *Fitzpatrick.* No. 75-251. Petitioner would suggest, however, that the decision of the court of appeals is so plainly inconsistent with the decisions of this Court as to warrant summary reversal.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the District Court, May 30, 1974

UNITED STATES DISTRICT COURT

D. CONNECTICUT

May 30, 1974

Civ. No. 15687

ROBERT A. MCAULIFFE,

v.

ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut.

Michael J. Churgin, and Stephen Wizner, New Haven, Conn., for plaintiff.

Maurice Myrun, Asst. Atty. Gen., East Hartford, Conn., for defendant.

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

NEWMAN, District Judge.

This suit raises interesting questions concerning fees and procedures which Connecticut imposes upon some persons who are mentally ill. The first is whether the State can charge some, but not all, prisoners for their maintenance at a state mental hospital while they are serving a criminal sentence. The second is whether the Commissioner of Finance and Control can automatically become the conservator of state mental patients with modest assets without a hearing to determine their incompetency.

The background facts leading up to the current controversy are not in dispute. On August 26, 1971, plaintiff was sentenced to serve a term of 360 days in the Hartford Community Corectional Center after conviction for breaking and entering. On September 21, 1971, the Commissioner of Corrections transferred him to a state mental health facility, the Security Treatment Center in Middletown.[1] Plaintiff served 218 days of his sentence at the Security Treatment Center and was released on April 26, 1972. Pursuant to Conn.Gen.Stat. § 17-318,[2] the Commissioner of Finance and Control billed plaintiff for $1,098.07,

[1] Two statutes, Conn.Gen.Stat. §§ 17-194a and 17-246, authorize the Commissioner of Corrections to transfer a state prisoner to a state hospital for mental illness. Plaintiff does not claim that the State failed to comply with the commitment requirements of these statutes, nor does he attack their constitutionality. The constitutionality of transfer procedures is a pending issue in Chesney v. Manson, 377 F.Supp. 887 (D. Conn.1974).

[2] Conn.Gen.Stat. § 17-318 provides:

> When any person has been transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women or the Connecticut Reformatory to a state hospital, such person's hospital expense prior to the termination of his sentence shall be charged to the state. *When any person has been transferred from a jail to a state hospital, such person's hospital expense prior to the termination of his sentence shall be paid out of the estate of such person, if he has any estate; if he has no estate, it shall be paid by the state.* If any person, whether transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women, the Connecticut Reformatory or a jail, is committed to a state hospital after the expiration of his sentence, such person's hospital expense shall be paid to the state in the manner provided for payment in this chapter. (Emphasis added).

As a consequence of reorganization of Connecticut correctional institutions, references to specific institutions in Conn.Gen.Stat. § 17-318 should be construed as follows:

> ["State] Prison" . . . shall be construed to mean the Connecticut Correctional Institution, Somers [hereafter CCI, Somers]; "State Prison for Women" shall be construed to mean the maximum security division of the Connecticut Correctional Institution, Niantic [hereafter CCI, Niantic]; "jails" or "jail" shall be construed to mean the Community Correctional Centers . . . and those portions of the Connecticut Correctional Institution, Niantic, used to detain female persons awaiting disposition of pending charges or to confine female persons convicted of, or who plead guilty to, the commission of misdemeanors and who have been sentenced to community correctional centers . . .; "Connecticut Reformatory" shall be construed to mean the Connecticut Correctional Institution, Cheshire [hereafter CCI, Cheshire], "The Connecticut State Farm for Women" shall be construed to mean the Connecticut Correctional Institution, Niantic. Conn.Gen.Stat. § 1-1 (Supp. 1973).

[3] Conn.Gen.Stat. § 4-68g provides:

> Whenever any person having property or an interest in property is committed or admitted to a state institution for the mentally ill or mentally retarded or, subsequent to such commitment or admission, acquires property or an interest in property, and the property is personal property of any kind or nature, not in excess of five thousand dollars, or annual income not in excess of said amount, no guardian or conservator shall be appointed, and the commissioner of finance

the cost of his "hospital expense" at the Security Treatment Center computed at the rate of $5.037 per day for 218 days. This sum was collected from social security benefits that defendant was holding as representative payee of the plaintiff. 42 U.S.C. § 405(j).

After expiration of his sentence, plaintiff was involuntarily committed to the Norwich Hospital, a state hospital for the mentally ill. While at Norwich he deposited $150.00 in a patient's account, intending to save the sum for future use. Later he attempted to withdraw money from his hospital account. However, he was informed that the funds in his account would not be returned since the Commissioner of Finance and Control had been appointed his conservator, pursuant to Conn.Gen.Stat. § 4-68g,[3] and had used

the $150.00 to pay for plaintiff's hospital treatment. Conn. Gen.Stat. § 17-295(c). The Commissioner's appointment as plaintiff's conservator was not preceded by a probate court hearing to ascertain whether plaintiff was "incapable of managing his affairs," Conn.Gen.Stat. § 45-70, as generally required for designation of a conservator.

Plaintiff has moved for summary judgment in this action seeking a declaratory judgment, pursuant to 42 U.S.C. § 1983, that Conn.Gen.Stat. §§ 17-318 and 4-68g violate the Fourteenth Amendment of the United States Constitution. Since the parties do not dispute the existence or the truthfulness of the material facts alleged in the pleadings and in plaintiff's affidavits, the merits of plaintiff's constitutional claims can appropriately be considered.

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and control shall be the guardian or conservator of such person, without court proceedings, only for the purposes hereinafter specified. He shall have authority to make any compromise or exercise any option, with the approval of the attorney general, for the purpose of collecting such funds or property. He shall have authority to release, in behalf of such person, his estate, any bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation, or individual, and, upon demand, any bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation or individual shall pay to the commissioner of finance and control, or to such person or persons as said commissioner directs, the amount due. Said commissioner shall hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator, and shall maintain records of such property or funds and the disposition thereof. The receipt of said commissioner or his agent shall be sufficient authority for such bank, insurance company, beneficial organization, executor, administrator, trustee, fiduciary agent, corporation or individual for such payment, and shall discharge its or his liability therefor.

I.

Constitutionality of Conn.Gen.Stat. § 17-318

Plaintiff does not challenge the State's power to charge prisoners for their expenses. Instead, he contends that § 17-318 violates the Equal Protection Clause by creating arbitrary classifications as to which prisoners must pay and which expenses they must pay. Five distinctions are identified, two concerning who must pay, and three concerning what expenses must be paid. (a) Prisoners transferred to a state mental hospital must pay hospital costs if they were transferred from a community correctional center (jail), but not if they were transferred from other penal institutions. (b) Prisoners transferred from a community correctional center to a state mental hospital must pay hospital costs if they are men, but not if they are women. (c) Prisoners covered by § 17-318 must pay for their hospital costs, but not the costs of their maintenance in jail. (d) Prisoners covered by § 17-318 must pay hospital costs if they were transferred to a state hospital for the mentally ill, but not if they were transferred to a general hospital for any other illness. (e) Prisoners covered by § 17-318 must pay for medical care at a state hospital for the mentally ill if they are transferred to such a hospital for in-patient care, no matter how brief their stay, but not for out-patient medical care no matter how prolonged their treatment.

The parties agree that "strict" judicial scrutiny of these classifications is not appropriate since they are not based upon "suspect" criteria and do not infringe upon "fundamental" rights. Therefore, rather than showing that the classifications created by § 17-318 are premised upon some compelling state interest, the State must prove that they

"rationally [further] some legitimate, articulated state purpose and therefore [do] not constitute an invidious discrimination in violation of the Equal Protection Clause. . . ." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The first classification distinguishes between those inmates transferred to state mental hospitals from community correctional centers and those transferred from all other penal institutions. Only the former are charged for their hospital costs. Historically, felons were incarcerated in state prisons and misdemeanants were committed to county jails. Consequently, defendant argues, § 17-318 reflects a legislative decision that misdemeanants "should have the same obligation to pay for hospital care as the non-criminal citizen," since, unlike felons, their brief confinement for one year or less does not significantly interfere with their earning capacity or deplete their assets.

In essence, defendant claims that § 17-318 is based upon the common law policy that persons treated at public humane institutions will not be permitted to receive state aid at the taxpayers' expense if they are capable of reimbursing the public for their care.[4] Although statutes pro-

[4] The development of this common law policy and its impact upon legislation was traced in State v. Ikey's Estate, 84 Vt. 363, 366-367, 79 A. 850, 851 (1911):

> By the common law of England it is the duty of the king to take care of all his subjects who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. . . .
> Under our form of government the sovereign state has the same common law duty resting upon it concerning the care and custody of persons and estates of those who are idiots from nativity, or who have lost their intellects, and become *non compos*, or unable to take care of themselves . . .; and it is manifest from the statutory regulations in this respect that the policy of the state is, as at common law, that the estates of such wards shall be appropriated to their proper maintenance, before they can be supported at the expense of the state. Indeed, . . . the statute concerning the insane poor . . . goes further than this; for in cases falling within the provisions of that section it must be found not only that the insane person is destitute of means to support himself, but also that he is without relatives bound by law to support him, before an order can issue for his confinement at the expense of the state. (Citations omitted).

viding state aid to citizens generally reflect this policy, its application to state expenditures for maintaining and treating prisoners is less frequent, but not novel. Earlier decisions often upheld the validity of statutes requiring prisoners to reimburse the State for their maintenance.[5] More recent cases have upheld prisoners' liability for mental health treatment received while serving their sentences,[6] or while in custody at state hospitals because they are unable to stand trial by reason of insanity.[7]

Connecticut undoubtedly has a legitimate interest in relieving its taxpayers by requiring prisoners with earning potential or assets to reimburse the State for the expense of maintaining them in state hospitals. However, under the current procedures for placing prisoners in state institu-

[5] *See* People v. Hawkins, 157 N.Y. 1, 51 N.E. 257; 10 Misc. 65, 31 N.Y.S. 115 (1898); Jefferson County v. Hudson, 22 Ark. 595 (1861); State v. Isaac, 13 N.C. (2 Dev.L.) 47 (1828); Washburn v. Belknap, 3 Conn. 502 (1821).

[6] *See* In Re Estate of Hockett v. State Dept. of Social Welfare, 177 Kan. 507, 280 P.2d 573 (1955); Green v. State, 272 S.W.2d 133 (Ct.Civ.App. of Tex.1954); Auditor General v. Hall, 300 Mich. 215, 1 N.W.2d 516 (1942); Auditor General v. Olezniczak, 302 Mich. 336, 4 N.W.2d 679 (1942).

[7] *See* Briskman v. Central State Hospital, 264 S.W.2d 270 (Ky. 1954); Estate of Gestner v. Bank of America Nat'l Trust and Savings Assn., 90 Cal.App.2d 680, 204 P.2d 77 (1949); State v. Griffith, 36 N.E.2d 489 (Ct.App. Ohio 1941); State v. Ikey's Estate, 84 Vt. 363, 79 A. 850 (1911).

tions, this purpose is not rationally furthered by a statutory classification based upon the assumption that a prisoner's place of incarceration is an accurate indicator of his ability to pay his state hospital expense.

Any prisoner, irrespective of the length of his sentence, may be transferred from one correctional facility to another correctional institution if "it appears to the Commissioner [of Corrections] that the best interests of the inmate or the other inmates will be served by such action." Conn. Gen.Stat. § 18-86. Pursuant to § 18-86, a misdemeanant or a felon, initially incarcerated at a Community Correctional Center under a sentence of one year or less,[8] would be transferred to CCI, Somers, if his background or the nature of his offense required rehabilitative treatment available at Somers or commitment to a maximum security institution. Therefore, misdemeanants and felons serving identically brief sentences may be incarcerated at a Community Correctional Center or at CCI, Somers. However, the inmate at the Community Correctional Center will be charged for his state hospital expenses under § 17-318 on the assumption that he has received a shorter sentence than an inmate at CCI, Somers, and will be removed from the competitive job market for a shorter period.[9]

[8] The sentencing provisions of Conn.Gen.Stat. § 53a-35(d) provide:

> (d) . . . [W]hen a person is sentenced for a class C or D felony or for an unclassified felony, the maximum sentence for which does not exceed ten years, the court may impose a definite sentence of imprisonment and *fix a term of one year or less.* (Emphasis added).

[9] Under Conn.Gen.Stat. § 18-73, any male person between the ages of sixteen and eighteen years of age who is amenable to reformatory methods may be committed by the Superior Court to CCI, Cheshire, if he is convicted of an offense which is punishable by imprisonment in the CCI, Somers, or in a Community Correctional Center, for a shorter period than life. A minimum reformatory sentence of nine months may be imposed under this section, and a reformatory sentence of any length may be suspended after six months.

Pursuant to Conn.Gen.Stat. § 18-75, the Circuit Court may sentence any male person between the ages of sixteen and twenty-one years of age to CCI, Cheshire, if the maximum penalty for his offense does not exceed imprisonment in state prison for five years. There is no statutory minimum sentence for persons sentenced under this provision, and it is not uncommon for prisoners to be paroled after serving nine months of their sentence.

Correlating these sentencing provisions with § 17-318, a twenty-year-old misdemeanant who is incarcerated at CCI, Cheshire, for nine months pursuant to § 18-75 will not be charged for his state hospital expenses despite his brief period of incarceration. However, another twenty-year-old misdemeanant who serves a nine-month sentence for the same offense in a Community Correctional Center, because he is not amenable to reformatory methods, will be billed for his hospital expenses athough his earning capacity is impeded for an equal period of incarceration. Obviously, whatever historical validity may have existed for presuming that individuals in the State Reformatory would be less able to bear their hospital costs than inmates in jail has been significantly diminished by more recent sentencing provisions.

Many inmates at Community Correctional Centers who are billed for their hospital costs may actually be imprisoned for longer periods than inmates at CCI, Somers. A felon receiving an indeterminate sentence in excess of one year from a Circuit Court, Conn.Gen.Stat. § 53a-35, is initially incarcerated at a Community Correctional Center. The Commissioner of Corrections then determines whether he should remain in a Community Correctional Center or whether it would be in the inmate's best interest to transfer him to CCI, Somers, for the balance of his sentence. Since many felons receiving indeterminate sentences may have already earned extensive jail credit awaiting trial and sentencing, they may not be transferred to CCI, Somers, but may serve the remaining portion of their indeterminate sentences in a Community Correctional Center.

If his jail time credit is added to the remaining portion of his sentence, a felon serving an indeterminate sentence in excess of one year at a Community Correctional Center may actually be imprisoned for a longer period than a felon or misdemeanant serving a sentence of less than one year at Somers.

Even if all inmates at CCI, Somers, were incarcerated for longer periods than prisoners at Community Correctional Centers, a statutory classification based upon place of incarceration would not rationally advance the state's interest in charging mental hospital expenses only to prisoners with income or assets. Under Conn.Gen.Stat. § 18-7, an inmate at Somers may be employed during his imprisonment. His wages are deposited in a bank account and are paid to him upon his release. Conn.Gen.Stat. § 18-85. However, if an inmate is still in custody, the warden at CCI, Somers, may pay any portion of the funds to the inmate or his relatives if their expenditure is necessary for the inmate's or his relatives' welfare. *Id.* Since an inmate's transfer from Somers to a state mental hospital is for his own welfare, the funds from his employment would presumably be available for paying his hospital expenses. It is arbitrary to exempt his assets, including his readily-available accrued wages, from being used for his state hospital costs and to charge inmates at Community Correctional Centers for such expenses when they may be unable to obtain employment during confinement or immediately after release, and may be overburdened with other obligations. Moreover, there are less job opportunities in jails than in prisons.

The second classification concerns the distinction between male misdemeanants imprisoned in a Community Correctional Center and female misdemeanants serving identical sentences at CCI, Niantic. Conn.Gen.Stat. § 1-1 (Supp. 1973) states that when the term "jail" is employed in a statute, it means ". . . those portions of the Connecticut Correctional Institution, Niantic, used to detain female persons awaiting disposition of pending charges or to confine female persons convicted of, or who plead guilty to, the commission of misdemeanors and who have been sentenced to community correctional centers. . . ." Since § 17-318 provides that the estate of any person who is transferred from a "jail" to a state hospital shall be charged for hospital expenses, it is arguable that female misdemeanants incarcerated at CCI, Niantic, are incarcerated in a "jail" within the meaning of Conn.Gen.Stat. § 1-1 and are therefore liable for their state hospital expenses. However, the State does not dispute plaintiff's point that female misdemeanants at CCI, Niantic, serving the same sentence as a male misdemeanant at a Community Correctional Center are in fact not charged for their state hospital costs under § 17-318.

It is difficult to perceive how a classification based upon the sex of an inmate bears a substantial relation to the State's interest in lightening the burden of taxpayers by charging prisoners with assets for their state hospital expenses. Perhaps this classification was derived from the outdated notion that females in our society do not possess their own income or assets but receive support from their families or spouses. In Frontiero v. Richardson, 411 U.S. 677, 689 n. 23, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973), the Supreme Court observed:

> In 1971, 43% of all women over the age of 16 were in the labor force, and 18% of all women worked full

> time 12 months per year. See U.S. Women's Bureau, Dept. of Labor, Highlights on Women's Employment & Education 1 (W.B. Pub. No. 72-191, Mar. 1972). Moreover, 41.5% of all married women are employed. See U.S. Bureau of Labor Statistics, Dept. of Labor, Work Experience of the Population in 1971, p. 4 (Summary Special Labor Force Report, Aug. 1972). . . . [T]he median income for all women over the age of 14, including those who are not employed, is approximately $2,237. See Statistical Abstract of the United States Table No. 535 (1972), Source: U.S. Bureau of the Census, Current Population Reports, Series P-60, No. 80. . . .

Therefore, current employment statistics for females refute whatever historical validity there may have been for according such differential treatment to female misdemeanants under § 17-318. The Supreme Court's recent upholding of a State's tax exemption for widows, Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974), does not validated Connecticut's attempt to impose added charges upon prisoners simply because they are males.

It is conceivable that it would be more efficient for the State not to bill female misdemeanants at CCI, Niantic, for their state hospital expenses since it might be time consuming to determine which females at Niantic are "in jail" within the meaning of Conn.Gen.Stat. §§ 1-1 and 17-318. Although the Supreme Court is divided on the issue of whether a classification based on sex is inherently suspect,[10]

[10] *See* Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971).

recent decisions unequivocably indicate that "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Equal Protection Clause of the Fourteenth Amendment]. . . .' Reed v. Reed, 404 U.S., at 77, 76, 92 S.Ct. 251." Frontiero v. Richardson, *supra*, 411 U.S., at 690. Obviously, mere administrative convenience is not sufficient to sustain § 17-318's differential treatment of male and female misdemeanants against a constitutional challenge on equal protection grounds.

Turning now to the variations among payments that are charged, the third classification makes a distinction between maintenance costs at a jail, which are not charged, and maintenance expenses at a mental hospital, which are charged. If, as is likely, maintenance costs at a mental hospital are higher than at a jail, the state's purpose of easing the burden on taxpayers might well be rationally furthered by charging for mental hospital costs but not jail costs. Even if the factual basis for such a distinction were demonstrated, the further distinctions that § 17-318 makes among chargeable costs add to its constitutional infirmity.

The fourth classification makes a distinction between hospitalization costs for mental illness, which are charged, and hospitalization costs for all other illnesses, which are not charged.[11] It may well be that in some instances the costs

[11] Under § 18-52a, a prisoner incarcerated in a Community Correctional Center who "becomes sick with a disease or malady which requires hospitalization for surgery or other medical care may be transferred . . . to any state hospital having facilities for such

of mental illness hospitalization exceed the costs of hospitalization for other illnesses, but there has been no demonstration that this is true generally, or for the class of transferred prisoners in particular. The State has not attempted to categorize the costs to be charged by reference to a minimum hospital stay or a minimum dollar amount. It has simply selected mental illness out of all the conditions that may require hospitalization and imposed on one class of prisoners a charge for such care. There is no basis for concluding that this classification of costs rationally furthers a legitimate state interest.

The fifth classification makes a distinction between mental illness expenses of hospitalized prisoners, which are charged, and out-patient mental illness expenses of prisoners, which are not charged. There may be facts to demonstrate that, on the average, hospitalization expenses for mentally ill prisoners exceed the costs of their out-patient care, although the risk of overinclusiveness of this classification appears high, especially in view of the modern trend toward reducing the in-patient treatment time for mental illness. Whether this classification standing alone would invalidate the statute need not be decided, since the combination of all the classifying criteria plainly place the statute beyond the outer limits of even a restrictive view of the equal protection clause.

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care. . . ." Since § 17-318 refers to charging prisoners for state hospital expense without limiting the state's right of reimbursement expenses incurred at state *mental* hospitals, it is arguable that prisoners transferred to state hospitals for surgery or other medical care, are also liable for their hospital expenses. However, the defendant has conceded that the § 17-318 has been applied to obtain reimbursement only for hospital expenses incurred by prisoners transferred to state mental health facilities.

II.

Constitutionality of Conn.Gen.Stat. § 4-68g

Conn.Gen.Stat. § 4-68g creates a significant exception to the procedural requirements for the appointment of a conservator for a person receiving state care or assistance.[12] Prior to the appointment of a conservator, patients at state institutions for the mentally ill who have personal property or an annual income of less than $5,000.00 are not afforded the procedural safeguards of notice and an adversary competency hearing by a probate court. Instead, their mere commitment or admission to a state institution for the mentally ill authorizes the Commissioner of Finance and Control to serve as their conservator and to hold or use their personal property or income for their support and benefit "in the same manner as a duly appointed conservator." Conn.Gen.Stat. § 4-68g. Plaintiff contends that § 4-68g infringes his right to due process of law, guaranteed by the Fourteenth Amendment, because it deprives him of his civil rights to enter and enforce contracts, settle obligations or make gifts of his property without the essential safeguards of notice and an opportunity to be heard on the issue of his competency.

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[12] Under Conn.Gen.Stat. § 45-70, the Commissioner of Finance and Control may apply to a probate court for the appointment of a conservator for any person with property who is receiving state care or assistance. If the person receiving state aid is in a state institution, notice of a competency hearing must be left with the supervisor of the institution at least five days before the hearing date. Conn.Gen.Stat. § 45-71. The alleged incompetent may attend the probate hearing with counsel, cross-examine adverse witnesses, and present evidence to refute his competency. If there is evidence sufficient to support a finding that the person receiving state care is "incapable of managing his affairs," the probate court will appoint a conservator for his property. Conn.Gen.Stat. § 45-70.

Conn.Gen.Stat. § 4-68g creates the presumption that persons with personal property or assets of less than $5,000.00 are incapable of managing their affairs after commitment or admission to a state mental institution. This presumption of incompetency is irrefutable and irreversible since mental patients falling within the purview of §4-68g are never afforded the opportunity to establish their ability to manage their affairs.

Prior decisions have indicated that involuntary commitment to a mental institution does not support even a presumption that a mental patient is incompetent. In Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971), the Court of Appeals stated:

> . . . [T]he law is quite clear in New York that a finding of "mental illness" even by a judge or jury, and commitment to a hospital, does not raise even a presumption that the patient is "incompetent" or unable adequately to manage his own affairs. Absent a specific finding of incompetence, the mental patient retains the right to sue or defend in his own name, to sell or dispose of his property, to marry, draft a will, and, in general to manage his own affairs. (Citations omitted).

Relying upon this statement in *Winters*, Judge Blumenfeld indicated in Logan v. Arafeh, 346 F.Supp. 1265, 1269-1270 (D.Conn.1972), that involuntary commitment of a mental patient, pursuant to Conn.Gen.Stat. § 17-183, does not create a presumption of incompetency. By creating an irrebutable presumption of incompetency, § 4-68g denies plaintiff due process of law. *Cf.* Cleveland Bd. of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Vlandis

v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

The statute also conflicts with the Equal Protection Clause by exempting from the presumption of incompetency persons who own real property of any value or who possess personal property or income in excess of $5,000.00. These persons are entitled to an independent competency hearing in recognition of the fact that all mental patients are not incapable of managing their affairs. Obviously, it is irrational to think that all or even most state mental patients without real property and without personal property and income of more than $5,000.00 are incompetent.

The State undoubtedly has a legitimate interest in obtaining reimbursement for state mental health care rendered to individuals with assets. There may also be a greater urgency in establishing state control over the estates of state mental health patients with modest assets since their funds could be rapidly depleted.

Pursuant to Conn.Gen.Stat. § 45-72, a probate court may appoint a temporary conservator for thirty days if two physicians certify that a person is incapable of managing his affairs. Prior to the expiration of this thirty-day period, a permanent conservator may be appointed after the alleged incompetent has been afforded a full-scale competency hearing. Conn.Gen.Stat. §§ 45-70 and 45-71. It would appear that these procedures could be used to appoint the Commissioner of Finance and Control as the temporary conservator of state mental health patients with modest estates upon certification by physicians that they are incapable of managing their affairs. Since probate court hearings at state mental institutions are not infrequent, a full-scale

competency hearing could be scheduled within thirty days of the appointment of the Commissioner as temporary conservator. Under these procedures, the State would also avoid the cost of administering the estates of mental health patients who are competent. Perhaps the statutes could be amended to permit the Commissioner to initiate such proceedings.

There is also merit to plaintiff's claim that § 4-68g stigmatizes a mental patient as an incompetent without due process of law. In Wisconsin v. Cinstantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1970), the Supreme Court sustained a constitutional challenge to a statute permitting the "posting" of persons as excessive drinkers without affording them notice or an opportunity to be heard. Procedural due process must be satisfied whenever the State attaches a "badge of infamy" to a citizen, although it may "not involve the stigma and hardships of a criminal conviction." Anti-Facist Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed.2d 817 (1951) (concurring opinion). In Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971), the Court of Appeals expressly characterized incompetency as a stigma.

Since the plaintiff's incompetency cannot be presumed from his involuntary commitment to Norwich Hospital, he was not officially branded with the stigma of being unable to manage his affairs until the Commissioner of Finance and Control was appointed his conservator, and this occurred without giving him any hearing on the issue of his competency.

Since Conn.Gen.Stat. §§ 17-318 and 4-68g violate the Fourteenth Amendment, plaintiff's motion for summary judgment is granted.[13] Judgment will enter declaring

[13] Plaintiff has requested this Court to order the defendant to return with interest from the date of seizure the property taken from him pursuant to Conn.Gen.Stat. §§ 17-318 and 4-68g. No order appears necessary at present, since it is expected that, in light of this decision declaring the challenged statutes unconstitutional, defendant will agree to return to plaintiff the property taken from him. If this does not occur, plaintiff can apply for a supplemental judgment. At that time consideration can be given to whether defendant has available a defense of sovereign immunity, Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), or whether such defense is inapplicable to what is essentially a claim for restitution.

§ 17-318 unconstitutional to the extent that it imposes hospital costs upon any person transferred from a jail as defined in Conn.Gen.Stat. § 1-1, and declaring § 4-68g unconstitutional in its entirety.

Opinion of the District Court, January 16, 1975

UNITED STATES DISTRICT COURT

D. Connecticut

Jan. 16, 1975

Civ. No. 15687

Robert A. McAuliffe,

v.

Adolf G. Carlson, Commissioner of Finance and Control of the State of Connecticut.

Michael J. Churgin, Stephen Wizner, New Haven, Conn., for plaintiff.

Maurice Myrun, Asst. Atty. Gen., East Hartord, Conn., for defendant.

Ruling on Plaintiff's Motion for Supplemental Relief

Newman, District Judge.

Plaintiff's motion for supplemental relief presents in an unusual context questions concerning waiver of Eleventh Amendment protection. In the first stage of this litigation, brought pursuant to 42 U.S.C. § 1983, this Court granted plaintiff's motion for summary judgment and entered an order declaring unconstitutional Conn.Gen.Stat. §§ 17-318 and 4-68g, McAuliffe v. Carlson, 377 F.Supp. 896 (D.Conn. 1974) (*McAuliffe I*). Under the authority of these statutes defendant, Connecticut's Commissioner of Finance and

Control, had taken two sets of funds belonging to plaintiff, and had applied the money to reimburse the State for expenses incurred in providing care for plaintiff at two State mental health facilities.

The first sum of money taken by defendant was $1,098.07 in disability benefits due plaintiff under Title II of the Social Security Act. Plaintiff had been transferred to the Security Treatment Center, Middletown, from the Hartford Community Correctional Center, and § 17-318 made all such transferees liable for the costs of their "hospitalization." To enforce this liability against plaintiff, defendant applied, under the authority conferred on him by Conn.Gen.Stat. § 4-68c,[1] to the Secretary of Health, Education and Welfare, who authorized defendant to receive plaintiff's social security benefits as "representative payee," 42 U.S.C. § 405(j), 20 C.F.R. § 404.1601, and to expend those funds for plaintiff's use and benefit.

Plaintiff himself never had control over or possession of these funds. They were sent directly to defendant as representative payee, and he, in effect, transferred them to himself as Commissioner of Finance and Control and billing agent for the State of Connecticut. *McAuliffe I* held the statute making plaintiff liable for his hospital costs unconstitutional as a denial of equal protection; this use of plaintiff's funds was therefore unlawful.

The second sum was $150 over which plaintiff did initially have control. After being transferred from the Security Treatment Center to Norwich Hospital, plaintiff had begun receiving his own social security benefits pur-

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[1] Although the statute does not provide explicitly for the Commissioner's assumption of the role of representative payee, plaintiff has alleged that this statute confers such authority, defendant has not disputed the contention, and no contrary authority has been found.

suant to the Secretary's decision to remove the Commissioner as representative payee. Plaintiff had deposited his disability benefits in a patient's account at the hospital, expecting to draw on the account for his personal needs. Section 4-68g authorized defendant automatically to act as plaintiff's conservator. Defendant assumed this position for the purpose of paying the balance in plaintiff's account to himself, again as billing agent for the State, to cover plaintiff's hospital bill. Though plaintiff's obligation to pay these costs was entirely lawful, *McAuliffe I* held that defendant's automatic "appointment" as conservator violated due process requirements; defendant's acquisition of the $150 was therefore unlawful.

Plaintiff's complaint sought, in addition to declaratory relief, an order that the State return plaintiff's funds. *McAuliffe I* deferred such a ruling, and indicated that if the State failed to return the funds in response to the declaratory judgment, plaintiff could move for supplemental relief, at which time the Court would be confronted with the issue of sovereign immunity, 377 F.Supp. at 906, n. 13. The State declined to return the money, and the present motion for an order directing the return, and for attorneys' fees and costs, followed. Defendant has responded to the motion by urging that this Court is without jurisdiction. He argues that he is sued in his official capacity, that the State has not consented to be sued, and that the claim for monetary relief is therefore barred by the Eleventh Amendment.

The initial question is whether the Eleventh Amendment, if not waived, provides protection against plaintiff's claims Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), suggests that it does. Like the claim there for retroactive welfare benefits, plaintiff's claims here will be

paid from the State treasury and are owed because of a breach of a legal duty by a State official. Plaintiff contends *Jordan*, which did not involve money taken from the claimants, should be limited to claims for *state* funds, pointing out that the money sought here belonged to the plaintiff before the defendant acquired it.

The argument suggests that the Eleventh Amendment does not insulate a state from claims for restitution. Such an exception would still leave a state protected from unlimited assaults on its fisc, and would therefore appear consistent with the values generally protected by the Eleventh Amendment. The Supreme Court, however, has previously held the Amendment available to bar a taxpayer's claim for a refund of his own money unlawfully collected. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945). The claimant in *Ford Motor Co.* made the decision, however unwillingly, to part with his money, whereas plaintiff here had his money taken with no action on his part at all, but there is no intimation in the opinions in *Ford Motor Co.* or *Jordan* that original ownership of the claimed funds determines Eleventh Amendment protection. Once the money enters the state treasury, the Eleventh Amendment bars its return. McAuliffe may therefore recover only if the State has waived the Amendment's protection and consented to McAuliffe's suit.

Prior decisions on Eleventh Amendment waiver offer little guidance. If the defendant's liability arose from activity outside the normal sphere of governmental operations, waiver could be found. See Parden v. Terminal R. Co., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). However, neither maintaining mental health facilities, *cf.* Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973); Rothstein

v. Wyman, 467 F.2d 226 (2d Cir. 1972), nor seeking reimbursement from patients for the services provided in such facilities, is so far beyond usual state activities as to remove Eleventh Amendment protections.[2] But an issue of waiver nevertheless remains because of the particular means by which the State authorized the Commissioner to seek reimbursement for hospitalization expenses.[3] With respect to each set of funds the question presented is whether the statute authorizing the Commissioner's assumption of a fiduciary role states with sufficient clarity that the Commissioner will have the same exposure to suit as would a private citizen serving in the same role. See Edelman v. Jordan, *supra,* 415 U.S. at 673, 94 S.Ct. 1347.

With respect to the funds taken by defendant as representative payee, the legislature provided explicitly for the Commissioner to perform his fiduciary duties with precisely the same powers and *obligations* as any other fiduciary. Conn.Gen.Stat. § 4-68b creates the office of Estate Administrator, whose occupant serves under the Commissioner of Finance and Control. It was as the Estate Administrator that the Commissioner became representative payee, see n. 1, *supra.* Section 4-68c empowers one holding the office of Estate Administrator to act, *inter alia,* in any fiduciary capacity "under . . . any instrumentality . . . of the United States qualified to appoint fiduciaries . . . ." The statute grants the Administrator all "the same rights and powers" of other fiduciaries, and subjects him to "*the same duties and obligations as are possessed by and imposed upon* guardians, conservators, administrators and *other fiduciaries* . . . ." (Emphasis added.) The Department of Health, Education and Welfare is without doubt an instrumentality of the United States qualified to appoint fiduciaries, and a representative payee clearly is such a fiduciary, see 20 C.F.R. § 404.1601 et seq.

The conclusion is the same with respect to the statute authorizing the Commissioner's service as conservator. Conn.Gen.Stat. § 4-68g empowers the Commissioner, as statutory conservator, to "hold or use such property or funds for the support and benefit of such person *in the same manner as a duly appointed conservator* . . . ."[4] (Emphasis added.)

Each statute describes the roles available to the Commissioner by reference to traditional fiduciary relationships with clearly defined sets of powers and duties. Each statute must thus be taken to reflect not only an intent to allow the Commissioner to serve effectively as the State's bill collector, but also a carefully expressed concern that the Commissioner do so with strict regard for

[2] Though the State undoubtedly performs a traditional function in seeking to collect funds owing to it, there is room for doubt whether the means used here are sufficiently within normal State activity to preserve Eleventh Amendment protection. Having a state official act as representative payee and as conservator for one alleged to owe funds may be valid techniques for collecting money, but they are somewhat unusual. Decision need not rest on this distinction, however, in view of the way the State employed these techniques.

[3] The situation would have been entirely different if, for example, a relative of plaintiff had served as representative payee and as conservator. If the State had collected from such a private fiduciary, the Eleventh Amendment would clearly have barred plaintiff's claims, even if the obligation to pay was later declared to be without legal foundation or if there was a defect in the procedure for designating the fiduciary.

[4] Neither statute involved here raises the question whether a consent to suit permits such suits to be brought only in state courts, or in both federal and state courts. *Compare, e.g.,* Ford Motor Co. v. Dept. of Treasury, *supra;* Medicenters of America, Inc. v. Commonwealth of Va., 373 F.Supp. 305 (E.D.Va. 1974), *with* Flores v. Norton & Ramsey Lines, Inc., 352 F.Supp. 150 (W.D.Tex. 1972).

the usual legal rights of persons in plaintiff's circumstances. When the legislature authorized the Commissioner to become a *conservator*, it took into account all the content that centuries of judicial construction have added to that title. Similarly, although the term "representative payee" does not appear in § 4-68c, the references in earlier portions of that statute to specific fiduciary roles make plain that the Commissioner is to perform the functions of a particular office and not merely receive checks for the benefit of the State.

Neither statute states in terms that the Commissioner *qua* fiduciary is subject to suit, but such language is for the foregoing reasons, if not superfluous, certainly unnecessary. Each statute involved here very clearly imposes on the Commissioner the obligations normally associated with the offices he is empowered to assume. Such careful specification of obligations would be meaningless unless the legislature had contemplated that the normal means for enforcing such obligations would be available. The inference is thus inescapable that the Connecticut General Assembly has consented to suits against the Commissioner of Finance and Control to enforce fiduciary obligations assumed by him when he acts pursuant to the authority of Conn.Gen.Stat. §§ 4-68c and 4-68g.

There remains for consideration the liability of a fiduciary for the actions taken by the defendant. That liability is clear as to the $1,098.07 used to pay the obligation unconstitutionally created by § 17-318. By consenting for his ward to payments not constitutionally required, the Commissioner violated his fiduciary duties. When a fiduciary receives funds to be used for the benefit of his ward, he becomes debtor to the ward for that amount, *cf.* Lawrence v. Security Co., 56 Conn. 423, 441, 15 A. 406 (1888),

and he relieves himself of that obligation only by making payments to or for the benefit of the ward. *Ibid.* An improper payment does not affect the debtor-creditor relationship thus established, but rather becomes the personal obligation of the fiduciary. Elmendorf v. Poprocki, 155 Conn. 115, 120, 230 A.2d 1 (1967); Lawrence v. Security Co., *supra;* Brown v. Eggleston, 53 Conn. 110, 116-117, 2 A. 321 (1885).

Among the duties imposed on Connecticut fiduciaries is the protection of the ward's assets from unjust and illegal claims. Winchell v. Sanger, 73 Conn. 399, 47 A. 706 (1900); Clement's Appeal from Probate, 49 Conn. 519 (1882). A fiduciary who makes an improper payment is accountable to his ward for the sum so disbursed. Elmendorf v. Poprocki, *supra;* Dettenborn v. Hartford National Bank & Trust Co., 121 Conn. 388, 185 A. 82 (1936); Brown v. Eggleston, *supra,* and good faith is no defense to that liability. *Cf.* State v. Washburn, 67 Conn. 187, 34 A. 1034 (1896); Stempel v. Middletown Trust Co., 7 Conn.Supp. 205 (Super.Ct.Htfd.Cty.1939), remanded on other grounds, 127 Conn. 206, 15 A.2d 305 (1940). If restitution is not made voluntarily, it may be ordered by a court. *Ibid.*

Defendant's breach of duty also involves a second element. The funds were taken not only in payment of an obligation unconstitutionally imposed, but also for the benefit of the fiduciary and the fiduciary's employer. See Clement's Appeal from Probate, *supra;* Holbrook v. Brooks, 33 Conn. 347 (1866). Under all the circumstances, the breach of trust is patent, and restitution is a particularly appropriate remedy.

The appropriateness of surcharging the Commissioner for his acts as conservator in using the $150 of social security payments is somewhat less obvious. Although the Commissioner's appointment as conservator pursuant to § 4-68g

was defective, the payment he made in that capacity was in response to a legitimate obligation imposed on plaintiff to reimburse the State, to the extent he was able, for the expenses of his care. It could be argued that on these facts the Connecticut courts would treat the Commissioner as a guardian *de son tort,* see 39 C.J.S. Guardian and Ward § 3, at p. 13, and credit him for the expenditures. See In re Gilfillen's Estate, 170 Pa. 185, 32 A. 585 (1895).

Defendant has chosen to rely solely on the Eleventh Amendment defense, however, see Fed.R.Civ.P. 12(b). He has not raised any other defense, perhaps because he has concluded that his state more closely resembles that of a creditor who would not be permitted to reach these social security funds, Philpott v. Essex County Welfare Board, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 698 (1973), 42 U.S.C. § 407, than it does that of a bona fide fiduciary who could appropriately apply the funds against plaintiff's obligation to the State, see 20 C.F.R. § 404.1606. See also McDougald v. Norton, 361 F.Supp. 1325, 1326 n. 2 (D.Conn.1973) (three-judge court). In any event, the Eleventh Amendment defense has failed, no other defense has been interposed, and restitution is therefore proper.

Plaintiff's motion for attorneys' fees stands on a different footing. The Court does have discretionary authority to award fees in a § 1983 suit, Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 497 F.2d 1113 (2d Cir. 1974), but the facts of the present case do not make such an award appropriate. Defendant's continued refusal to refund the money, even after the declaratory judgment, raised legitimate and substantial questions of Eleventh Amendment law. The refusal certainly cannot be characterized as that kind of "unreasonable, obdurate obstinacy" that justifies imposing attorneys' fees as a penalty, compare Stolberg v. Members of the Board of Trustees for the State Colleges of the State of Connecticut, 474 F.2d 485, 490 (2d Cir. 1973). Section 1983 itself provides no explicit encouragement for the award of attorneys' fees, Bridgeport Guardians, *supra,* 497 F.2d at 1115; compare Bradley v. Richmond School Board, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), and plaintiff's victory has not created a fund for the benefit of a class, see *id.* at 706 n. 8.

Accordingly, it is hereby ordered that judgment enter against the defendant Commissioner of Finance and Control for $1,098.07 plus $150.00, with interest at 6% from June 30, 1972, and January 19, 1973, respectively. Plaintiff's motion for attorneys' fees is denied, but he may recover his costs.

Opinion of the Court of Appeals, August 1, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 951—September Term, 1974.

(Argued June 20, 1975 Decided August 1, 1975.)

Docket No. 75-7125

ROBERT A. McAULIFFE,

Plaintiff-Appellee,

v.

ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut,

Defendant-Appellant.

Before:

LUMBARD, GIBBONS* and GURFEIN,

Circuit Judges.

Appeal from a supplemental order of the United States District Court for Connecticut, Jon O. Newman, *J.*, directing the Defendant Commissioner of Finance of Connecticut to return to plaintiff certain property taken from him under Connecticut statutes later declared to be unconstitutional. The District Court held the Eleventh Amendment inapplicable because of an alleged waiver by the State. The Court of Appeals, Gurfein, *J.*, held that consent to be sued

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

by the state in the *federal* courts could not be inferred from a putative waiver of sovereign immunity.

Reversed.

MAURICE MYRUN, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General, and Paige J. Everin, Assistant Attorney General, Hartford, Conn., of counsel), *for Defendant-Appellant.*

MICHAEL J. CHURGIN, New Haven, Conn. (Stephen Wizner and Dennis E. Curtis, New Haven, Conn.), *for Plaintiff-Appellee.*

GURFEIN, *Circuit Judge:*

This action was originally brought pursuant to 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, seeking declaratory relief holding certain Connecticut statutes unconstitutional and ordering moneys taken from the plaintiff-appellee, Robert McAuliffe, to be returned to him. McAuliffe was hospitalized in Connecticut mental health facilities after having been convicted of the crime of breaking and entering. Pursuant to two Connecticut statutes, the defendant-appellant, Connecticut's Commissioner of Finance and Control, obtained two sets of funds belonging to McAuliffe and applied the money toward the costs of McAuliffe's treatment. The first set of these funds consisted of Social Security benefits due McAuliffe, which defendant obtained directly from HEW after having been duly named McAuliffe's "representative payee" under 42 U.S.C. §405(j). The Commissioner's authority to appropriate such payments for appellee's hospital expenses was derived from Conn. Gen. Stat. §17-318, quoted in the mar-

gin.[1] The second sum was deposited by McAuliffe in a patient's account at one of the hospitals at which he was treated; this defendant obtained in his statutory role as McAuliffe's conservator.[2]

In an earlier opinion reported at 377 F. Supp. 896 (D. Conn. 1974) Judge Newman had rendered a declaratory judgment that the Connecticut statutes which authorized defendant's actions were unconstitutional. The District Court in that opinion expressly reserved the question

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1 Conn. Gen. Stat. §17-318 provides:

> When any person has been transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women or the Connecticut Reformatory to a state hospital, such person's hospital expense prior to the termination of his sentence shall be charged to the state. When any person has been transferred from a jail to a state hospital, such person's hospital expense prior to the termination of his sentence shall be paid out of the estate of such person, if he has any estate; if he has no estate, it shall be paid by the state. If any person, whether transferred from the State Prison, the State Prison for Women, The Connecticut State Farm for Women, the Connecticut Reformatory or a jail, is committed to a state hospital after the expiration of his sentence, such person's hospital expense shall be paid to the state in the manner provided for payment in this chapter.

The Commissioner's designation as "representative payee" of McAuliffe's Social Security benefits was pursuant to Conn. Gen. Stat. §4-68c, which authorized the Commissioner to act in a fiduciary capacity "under . . . any instrumentality . . . of the United States . . . ."

2 Conn. Gen. Stat. §4-68g provides in pertinent part:

> Whenever any person having property or an interest in property is committed or admitted to a state institution for the mentally ill or mentally retarded or, subsequent to such commitment or admission, acquires property or an interest in property, and the property is personal property of any kind or nature, not in excess of five thousand dollars, or annual income not in excess of said amount, no guardian or conservator shall be appointed, and the commissioner of finance and control shall be the guardian or conservator of such person, without court proceedings, only for the purposes hereinafter specified. . . . Said commissioner shall hold or use such property or funds for the support and benefit of such person in the same manner as a duly appointed conservator, and shall maintain records of such property or funds and the disposition thereof.

whether the Eleventh Amendment barred a claim for restitution as an incident to the present federal action if Connecticut should refuse to return plaintiff's property. 377 F. Supp. at 906 n.13. A supplementary decision ordering the Commissioner to return the money was rendered in response to Connecticut's continued refusal to do so in spite of the declaratory judgment of unconstitutionality. Judge Newman held that the Commissioner's acts violated fiduciary obligations imposed on him as a matter of Connecticut law.[3] 386 F. Supp. 1245 (D. Conn. 1975). On this appeal, the issue is whether there is federal jurisdiction for the order in light of the Eleventh Amendment.[4]

The Eleventh Amendment applies even when a state official is the only formal defendant and the state itself is not a named defendant. See *Fitzpatrick* v. *Bitzer*, —— F.2d ——, slip op. pp. 3923, 3932-33 (2 Cir., June 2, 1975). The state in such cases can, nevertheless, be the real party in interest because at issue is a "liability which must be paid from public funds in the state treasury." *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974) (funds wrongfully withheld). "These funds will obviously not be paid out of the pocket of petitioner [Carlson]" Id. at 664.

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3 Judge Newman also declined to award attorney's fees, which at the time the decision was rendered was thought to be a discretionary matter. A cross-appeal from that determination was withdrawn by permission of the court after the decision of the Supreme Court in *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 43 U.S.L.W. 4561 (U.S. May 12, 1975), limiting the award of fees to adversary counsel in the absence of settled doctrine or specific statutory authority. 42 U.S.C. §1983, the provision underlying the present action, contains no such authorization.

4 The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Amendment also bars suits against a state by its own citizens. *Hans* v. *Louisiana*, 134 U.S. 1 (1890).

We reject McAuliffe's contention that this case is not within the Eleventh Amendment because the money was taken from him involuntarily. Equitable restitution is, in practical effect, indistinguishable from an award of damages against the state. *Edelman, supra*, 415 U.S. at 668-69. Even in those cases where the claim is that a state has illegally taken or used plaintiff's property, not merely wrongfully withheld it, the Eleventh Amendment applies with full force; and neither the means of obtaining such funds nor the formalities of the manner in which they are held limits the scope of the Eleventh Amendment rejection of federal judicial power. *Ford Motor Company* v. *Department of Treasury*, 323 U.S. 459 (1945) (taxes unconstitutionally collected); *Knight* v. *State of New York*, 443 F.2d 415 (2 Cir. 1971) (real property unconstitutionally taken); *Fitzpatrick* v. *Bitzer*, *supra* (money held in separate fund).

The only exception in this area allows federal courts to require expenditure of state funds in implementing prospective relief, since such relief is said to have only an "ancillary" impact on the state treasury. See *Edelman, supra*, 415 U.S. 668; *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2 Cir. 1974). In this case no injunctive relief was sought or granted, and the payment ordered is not ancillary to prospective relief. The order requires the state to make a payment in restitution of a past wrong from the state treasury. Whether the payment is called damages, retroactive payment, or restitution, the effect upon the fisc is the same. We believe that *Ford Motor*, as reaffirmed in *Edelman*, 415 U.S. at 668-69, makes this clear, and the District Court so held.

Appellant's essential ground of appeal is that the District Court erred, however, in its holding that Connecticut has waived its Eleventh Amendment immunity from federal suit. We agree. The District Court held that both Connecticut statutes at issue contained implied waivers of immunity concerning disputes arising out of the Commissioner's fiduciary activities toward prisoner-patients. That may well be true, but it does not determine the question of federal jurisdiction. A state may waive Eleventh Amendment immunity, but "a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." *Great Northern Ins. Co.* v. *Read*, 322 U.S. 47, 54 (1945). See *Rothstein* v. *Wyman*, 467 F.2d 226, 238-39 (2 Cir. 1972), *cert. denied*, 411 U.S. 921 (1973). No such intention can be found here.

The fact that the funds taken from the appellee were funds to be paid to him by the Social Security Administration does not affect the Eleventh Amendment issue. Participation in the Social Security Act falls short of a "constructive" waiver of a participating state's Eleventh Amendment immunity. *Edelman, supra*, 415 U.S. at 673. In any event, the assumption by the Commissioner of fiduciary duties with attendant consequences was based upon Connecticut's own statutes. McAuliffe did not allege that federal statutes required these functions to be performed. Compare *Johnson* v. *Harder*, 383 F.Supp. 174 (D.Conn. 1974), affd. per curiam, 512 F.2d 1188 (2 Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3007 (U.S. June 2, 1975) (No. 74-1552). The extent of the fiduciary obligations at issue is thus a matter of state law.

In these circumstances, applying the test of the Supreme Court that such waiver may be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction'," *Edelman, supra*, 415 U.S. at 673 (citation omitted), we hold that Connecticut has not waived its immunity to federal suit.

Opinion of the Court of Appeals, August 1, 1975

We do not necessarily disagree with the District Court that the assumption of fiduciary obligations under the Connecticut statutes suggests the availability of judicial review. That would ordinarily mean state court review.[5] We think the District Court erred, however, when it went further. We have said recently (after the decision below) that "[u]nless a 'clear indication' to submit to suit in federal as well as state court can be found, a federal court cannot read the state's consent to be sued in its own courts as embracing federal jurisdiction." *Fitzpatrick* v. *Bitzer*, *supra*, slip op. at 3935. Considerations of comity underlying the Eleventh Amendment support the conclusion, moreover, that the state court is the more appropriate forum for judical review of the Commissioner's actions.

If federal rights should become involved in a state court action for restitution, the state courts will give them full effect. *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 298 (1973) (concurring opinion of Marshall, *J.*). We express no opinion, however, on Judge Newman's treatment of the substantive issues involved.

The supplemental order is reversed without prejudice to further proceedings in the state court.

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5 We have been cited to no Connecticut decisions which would aid in determining whether its courts have ever assumed jurisdiction to enforce such obligations under these statutes. Compare *Fitzpatrick* v. *Bitzer*, supra, slip op. at 3934; *Knight* v. *State of New York*, supra, 443 F.2d at 418-22.

Order of the Court of Appeals, September 5, 1975

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-7125

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of September, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,
HON. JOHN J. GIBBONS,
HON. MURRAY I. GURFEIN,
Circuit Judges.

ROBERT A. McAULIFFE,

Plaintiff-Appellee,

v.

ADOLF G. CARLSON, Commissioner of Finance and Control of the State of Connecticut,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellee

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro, Clerk.